

## Notes and News

### 'Customary unions' and 'Christian marriage'

SOME Africanists refuse to regard 'disintegration' as synonymous with 'demoralization'; they prefer to describe the social processes now at work as 'reconstruction'; for they discern the emergence of factors which are creating new bonds between members of African society. They would admit, however, that the constructive forces are at present less evident if not less potent than the disintegrative—than, for example, the migration of men and women to European towns and labour-centres. It is generally agreed that the introduction of Western civilization is largely responsible for widespread deterioration in sexual morality. No one would maintain that the old African system produced ideal relations between the sexes, but it did strive, and with considerable success, to control the natural impulses of men and women in the interests of a stable society, and chiefly by the establishment of the family which implies marriage and the legitimization of children. Now it is the family that is chiefly threatened by the new economic system.

Mr. Arthur Phillips, Judicial Adviser to the Kenya Government, in his remarkable Report on Native Tribunals, expresses the conviction that Government should give Africans the assistance which they undoubtedly need if they are to be successful in reintegrating their social life. The Christian Church has surely its own contribution to offer. But apparently Church and State are both bewildered by the complexity of the problems. There is no agreement anywhere on the measures that should be taken; and no unanimity as to the value and efficacy of the Marriage Ordinances which various governments have introduced. The law and practice in one colony differ from the law and practice in another, perhaps contiguous, colony. 'A vast muddle' is a recent writer's description of the position of marriage in England. What shall we name the position in Africa?

It is because of the tremendous importance of the subject that we have opened our pages to a discussion of it. Writers, African and European, who can speak from experience and who represent various points of view, have been invited to contribute to this symposium. The first two of the articles appear in this number and others will follow.

### *What is Christian marriage?*

BOTH Mr. Amoo and Mr. Childs write of 'Christian marriage' without clearly defining this ambiguous term. What distinguishes Christian marriage from any other marriage? Mr. Phillips points out that in British Africa we have in reality three forms of marriage: (a) according to native law and custom; (b) according to English law and custom; (c) Christian marriage. The distinction he draws between (b) and (c) helps to clear up the ambiguity; but still we have to ask, What constitutes Christian marriage? And can the expression have any legal significance?

The New Testament contains no full and self-contained law on marriage. Christ laid down no law but held up an ideal of what marriage should be: a union, lifelong and indissoluble, of one man with one woman, to the exclusion of all others on either side. Marriage was a recognized and honoured social institution among the peoples to whom the Gospel was first preached, as indeed it was in the Africa of yesterday. There was much in common between Roman law and Christian principle: both enjoined monogamy; they differed in that Roman law permitted divorce. And the Church accepted the civil law which ordained that, provided the parties were legally capable of intermarriage and intended immediately to begin cohabitation, any declaration of consent, in whatever form given, sufficed for a legal marriage. For about the first thousand years of the Christian era consent alone was regarded

as the only essential to a valid marriage. No priestly benediction was required as a condition of validity; mutual consent of the parties sufficed to form a marriage even though no priest were present. It was not until after the end of the ninth century that the Church, the different branches at different times, imposed obligatory ceremonies for the solemnization of marriage; but whatever might be the ceremonies, the chief constitutive element of marriage was still the mutual consent of the parties. Down to a quite recent date (1939) the old practice obtained in Scotland, where it sufficed for a man and woman to declare themselves husband and wife in the presence of witnesses. The Roman Catholic Church altered her law in 1563 by the decrees of the Council of Trent; thereafter no marriage was regarded as valid unless celebrated in the presence of three witnesses, one of whom must be a priest. In England a law of 1754 invalidated all marriage (with some allowance for special licences) unless celebrated in the parish church after due publication of banns. It was not until 1836 that in England secular ceremonies before a registrar were allowed.<sup>1</sup>

For the average Briton, perhaps, the nature of Christian marriage is obscured by the fact that the ceremony in Church is dual: a formula is pronounced by the clergyman which, with the subsequent registration, has a definite legal efficacy by bringing the parties under British law; and upon this formula is superimposed the blessing of the Church which has no legal effect whatever. In France the legal ceremony is performed at the town hall; the blessing is given in church, if at all. The purely religious service in either country sanctifies the marriage but has in itself no legal significance. The essential thing remains what it was in Roman law and what it has been all through Christian history: the mutual consent of the parties.

What, then, is Christian marriage? It is the union of a Christian man with a Christian woman, which, being otherwise valid, now receives the Church's blessing implying that the marriage, in accordance with Christian principles, is by the consent of the parties monogamous and indissoluble. In other words, as some would say: it means marriage between Christians which has the added sanctity of a Christian sacrament. From a legal point of view, there are not two things, different in kind and status, 'marriage' and 'Christian marriage'; there is only one, viz. 'marriage'.

### *Marriage by African Law and Custom*

MR. PHILLIPS quotes a ruling of the Supreme Court of Kenya in 1917 to the effect that 'a so-called marriage by the native custom of wife-purchase is not a marriage . . .', but points out that for most purposes Native customary unions have always in practice been recognized as marriages in that colony. In the Cape Colony at one time the Courts held that Native marriages were immoral in character and therefore invalid; so that apparently all children born of such marriages were illegitimate in the eyes of the law: the contract of *lobola* in particular was regarded as 'an immoral transaction'. By the Union Native Administration Act of 1927 a clear-cut distinction is drawn between 'marriage', i.e. under the common law, and 'customary unions', i.e. marriages according to native custom, which are now implicitly recognized. This marks the change in the attitude towards the customary law which obtains elsewhere than in the Union—a step towards the effective integration of African law into the general system. The universal problem of a homogeneous law applicable to a whole population remains to be solved; it may well be that the present legal dualism of common law and native law will gradually give way to an assimilation of the two systems. But under present conditions, and especially in regard to relationships such as marriage, the recognition of the customary African law is a necessity. In the opinion of many (the writer included) the distinction drawn between 'marriage' and 'customary union' is a monstrous piece of snobbery; it should never have been made, and should never be made in future.

<sup>1</sup> A. T. Macmillan, *What is Christian Marriage?* (1944), pp. 69 sqq.